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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

FIRST APPELLATE DISTRICT

DIVISION TWO

THE PEOPLE,

Plaintiff and Respondent,

v.

BRIAN ADRIANO PERKINS,

Defendant and Appellant.

A144358

(Contra Costa County
Super. Ct. No. 130006-0)

Defendant Brian Adriano Perkins was convicted after a jury trial of a felony violation of inflicting corporal punishment on a spouse/cohabitant/child's parent (Pen. Code, § 273.5, subd. (a)).¹ Imposition of sentence was suspended and defendant was placed on three years formal probation on April 15, 2013. In December 2014, after a contested hearing, Defendant was found in violation of the terms of his probation, and on February 4, 2015, the court revoked Defendant's probation and imposed a three-year prison sentence. This is an appeal after a contested violation of probation and a judgment sentencing defendant to state prison. Defendant's court-appointed counsel has filed a brief seeking our independent review of the record, pursuant to *People v. Wende* (1979) 25 Cal.3d 436, to determine whether there are any arguable issues for review. Defendant has also been informed of his right to file supplemental briefing, and he has not done so. After our independent review of the record, we find no errors or other issues requiring further briefing, and we affirm.

¹ All statutory references are to the Penal Code except as otherwise stated.

FACTUAL AND PROCEDURAL BACKGROUND

An information was filed on January 2, 2013, charging defendant with inflicting corporal injury (domestic violence) (§ 273.5, subd. (a)), criminal threats (§ 422), and cruelty to a child by endangering health (§ 273a, subd. (b)). It was also alleged that defendant had violated the grant of probation in two previous cases. (§ 1203.3.)

The Underlying Conviction for Domestic Violence

We summarize the facts of the underlying conviction only briefly as they are described in the Probation Officer's report. On November 17, 2012, at approximately 6:48 a.m., the Pittsburg police department responded to defendant's residence where he lived with his girlfriend and their seven-year-old son. Officers heard a victim (defendant's girlfriend) crying out for help and asking defendant to stop, and heard sounds consistent with someone being struck. The seven-year-old child answered the door and appeared frightened. The victim was sobbing hysterically and holding her bruised eye. She stated that defendant had come home late and was drunk. He went to bed, and when he woke up they began arguing. "They walked into the kitchen, and the defendant followed her and then pushed her against the bedroom wall, threatening to throw her out the window. She tried to call police for a second time, but the defendant grabbed the phone again and became increasingly upset. He then strangled her and punched her repeatedly about her head and face. She screamed for help, but was having difficulty talking, as the defendant was strangling her. Their seven-year-old son was interviewed [by law enforcement], and as the victim's face continued to swell, she was transported to the hospital by ambulance."

Defendant was convicted of the domestic violence count only. Imposition of sentence was suspended and defendant was placed on formal probation for a period of three years with various terms and conditions, including that he spend one year in the county jail with 149 days actual and 148 days conduct credit, for a total of 297 days credit for time served. One of the terms of probation was that he obey all laws.

As to the allegations that defendant had violated his two earlier grants of probation, the court found these allegations true in light of his conviction for domestic

violence. These two earlier grants of probation were for driving under the influence of alcohol. At the time of sentencing on the domestic violence conviction, defendant's two prior probations were revoked and reinstated.

The Subsequent Probation Violation

On approximately September 17, 2014, the probation department filed a petition to revoke defendant's probation arising from his arrest on September 12, 2014, for committing conspiracy (§ 182, subd. (a)), robbery (§ 211), and false imprisonment (§ 236). The court ordered that defendant's probation be revoked in absentia, and a no bail warrant was issued for his arrest.

Defendant contested the motion to revoke his probation. The court held an evidentiary hearing on December 23 and 24, 2014, regarding the probation revocation. Defendant was represented by counsel.

The prosecution called Eric King to testify. On the night in question in September 2014, King was in Oakley at the house of a person whose name he did not know and who he had just met a few days before (the host). (As we will see, the house was at 968 Almanden Circle.) King and a few others were playing video games and gambling on the outcome. Defendant was at the house; King identified him in court. King had never met the defendant before that night. Defendant showed up and introduced himself to King and was "jolly."

King's testimony was unclear. The upshot was that, at about midnight, the host blocked King from leaving the house and took all of his money. The host threatened to shoot King. At this point in the evening, King was "up" about \$400, and had a total of \$900 dollars on him. The host had a "long like barrel like sock" which frightened King, and he turned over all \$900 to the host. In all, there were four people, including King and defendant, in the house when this happened.

On direct examination by the prosecutor, King was vague about defendant's role in the incident, except to acknowledge that defendant was the host's friend and that "I'm pretty sure if [defendant] thought that I was probably about to do something to [the host],

yeah, I'm pretty sure [defendant] probably would have had [the host's] back." This fact was going through King's mind while the incident was happening.

King recalled speaking to a police officer minutes after the incident and describing what happened. As we will see, King's statement to the police officer describing defendant's role in the incident was at odds with his testimony at the hearing. When confronted with the contradictions, King essentially said that he didn't recall making these statements to the officer. King admitted he did not want to come to court to testify, and that he had spoken by telephone to the prosecutor a few days earlier and told him that. King had a concern about talking about what happened in court. He also told the prosecutor that they didn't have the host, who in King's mind was the "main guy" who had the barrel with the sock on it pointed at him.

Sheriff's Deputy Michael England testified next for the prosecution. On the night in question, he was working as a police officer for the city of Oakley, and was dispatched at about 1:30 a.m. to 968 Almanden Circle. England encountered King and another person (Zanie) there. England conducted a search for suspects and saw defendant about 60 or 70 yards from the house at 968 Almanden, where he had already been detained minutes earlier by other officers. Defendant had been found in the bushes by another officer.

England testified that King identified defendant at the scene in the early morning hours immediately after the incident and said defendant had prevented him from leaving the house and locked the door. King told England that defendant had approached King and his friend Zanie and asked why they were leaving. When King said they just wanted to leave, defendant pushed Zanie out of the house, and then closed and locked the door and prevented King from leaving. Defendant pushed King back into the living room and said to the host, "let's get him." The host then pointed the object in a white sock at King, and King gave his money to the host. Defendant then pushed King out of the house and closed the door behind him. King referred to the host as "Mr. Coops."

The trial court denied defense counsel's request to call the prosecutor to the stand to testify about what King had said to him on the telephone in advance of the hearing.

At the close of testimony, counsel for defendant argued there was a discovery violation under section 1054 and a violation of *Brady v. Maryland* (1963) 373 U.S. 83 (*Brady*) because the prosecutor did not fully disclose the substance of the prosecutor's conversation with King on December 19, in advance of King's testimony at the hearing. The prosecutor responded that he had disclosed to defense counsel what had been relayed to him by King, including that King's main concern was that "we didn't have the person who, in his mind, he believed to be the person who was the most responsible. And the statement about [defendant] not being involved that was not relayed to me. [King's] concern was is that in his mind we didn't have the person who was the scary person to him, in addition to the fact that he didn't want to snitch." "[W]hat the witness told the court on the stand was his interpretation of the situation, which was not related to me in that fashion." The prosecutor denied that King ever made the statement to him on the telephone that defendant wasn't involved in the case.

The court denied the *Brady* motion and the discovery violation motion. The court described King's testimony as "to say the least, evasive and evolving" and noted that he never gave the "same accounting" of the facts. The court found that the prosecution had disclosed the gist of what the witness told him on December 19, and was not responsible for King's "evolving and/or evading" and the extent to which King's testimony came out differently when he testified at trial.

The court denied defense counsel's renewed request to call the prosecutor as a witness.

The court heard closing arguments from counsel before making its ruling. The court concluded that the prosecution had met its burden of showing by a preponderance of evidence that defendant violated probation. In announcing its ruling, the court explained at some length its reasons for "reject[ing] the entire testimony of Mr. King as not being credible." The court found the testimony "not only evasive, but . . . dishonest." The court found Deputy England's testimony credible and reliable.

At a hearing on February 4, 2015, the court denied defendant's motion to reconsider and non-statutory motion to dismiss the probation petition. The court then

heard argument from counsel about whether defendant should be reinstated on probation. The court determined not to reinstate defendant on probation in light of defendant “thumbing his nose at the terms and conditions of probation” by committing the violation that had been established at the probation revocation hearing, and in light of the court’s concern about public safety.

The court sentenced defendant to state prison for the midterm of three years, with 416 days actual and 416 days conduct credit.

REVIEW

Defendant was at all times represented by competent counsel who ably protected his interests.

Defendant was afforded due process.

The court’s findings were supported by substantial evidence.

No ruling by the trial court admitting or excluding evidence was an abuse of discretion.

The sentence imposed was lawful, and the court stated its reasons for imposing the sentence. (Cal. Rules of Court, rule 4.420.)

The fines, fees and assessments appear to have been authorized by statute.

We have reviewed the credits calculations and discern no issues on which we require further briefing.

We conclude there are no arguable issues within the meaning of *People v. Wende*, *supra*, 25 Cal.3d 436. The judgment is affirmed.

Miller, J.

We concur:

Kline, P.J.

Richman, J.

A144358, *People v. Perkins*